STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

ATLANTIS DEVELOPMENT, INC.,

Plaintiff,

vs. Case No. 2006-0403-CK

LANDMARK CONTRACTING COMPANY, INC.,

Defendant.
_____/

OPINION AND ORDER

Defendant has filed a motion to confirm the arbitrator's award in this matter.

Plaintiff filed this complaint on January 27, 2006. In its complaint, plaintiff alleges that the parties have been involved in a contract dispute regarding an agreement the parties entered into in 2001. Plaintiff avers that the parties submitted their dispute to binding arbitration before arbitrator John V. Tocco. Plaintiff states that the arbitrator awarded defendant $161,767.02,[1] but avers that the arbitrator exceeded his authority in awarding this sum to defendant.

Review of arbitration awards is limited, since "MCR 3.602 provides a circuit court with only three options when an arbitration award is challenged: it may (1) confirm the award, (2) vacate the award if obtained through fraud, duress, or other undue means, or (3) modify the award or correct errors that are apparent on the face of the award." *Konal v Forlini*, 235 Mich App 69, 74; 596 NW2d 630 (1999) (citation omitted). Courts cannot "engage in contract interpretation, which is a question for the arbitrator." *Id.* (citations omitted).

[1] This is inaccurate; the "Award of Arbitrator," attached to defendant's motion as Exhibit D, awards defendant $261,767.02.

An arbitrator's award may be vacated if, inter alia, "the arbitrator exceeded his or her powers" in rendering the award. MCR 3.602(J)(1)(c). There is "a strong presumption in favor of enforcing arbitral awards, [but] an award is properly vacated when that award is dependent upon an arbitrator's interpretation of provisions expressly withheld from arbitral jurisdiction, or upon an arbitrator's disregard and contravention of provisions expressly limiting arbitral authority." *Port Huron Area School Dist v Port Huron Educ Ass'n*, 426 Mich 143, 152; 393 NW2d 811 (1986).

In support of its motion to confirm the arbitration award, defendant notes that it submitted a demand for arbitration on June 13, 2003. Defendant claims that plaintiff answered this demand and submitted a counterclaim. Defendant avers that hearings in this matter were conducted over the course of three years, and that a final arbitration award was submitted to the parties on January 11, 2006. Defendant claims that the parties are bound by their contract to arbitrate and accept the ultimate arbitration award.

In response, plaintiff avers that the parties' agreement clearly specifies that mediation is a condition precedent to arbitration. Plaintiff maintains that the parties' never engaged in mediation, and thus asserts that the arbitrator lacked subject matter jurisdiction over the parties' dispute. Alternatively, plaintiff urges that the arbitration proceedings must be characterized as non-binding mediation. Plaintiff does not explain its failure to raise these objections until three years worth of hearings had been conducted and a final award rendered, but argues that issues concerning subject matter jurisdiction can be raised at any time. Further, plaintiff asserts that authority to arbitrate cannot be created through waiver, inactivity or acquiescence.

An arbitrator derives "jurisdiction and authority to resolve a particular dispute . . . exclusively from the contractual agreement of the parties; an arbitrator possesses no general

jurisdiction to resolve such matters independent of the arbitration contract." *Port Huron*, *supra* at 151-152 (citation omitted). An arbitration award that exceeds the scope of the arbitrator's authority is not binding on the parties. *Smith v Highland Park Bd of Educ*, 83 Mich App 541, 547; 269 NW2d 216 (1978). However, where a party proceeds without objection as to arbitrability, and submits the issues to the arbitrator for decision, the party is precluded from subsequently challenging an unfavorable award in court "by complaining, for the first time, that the issue decided was excluded from arbitration." *American Motorists Ins Co v Llanes*, 396 Mich 113, 114; 240 NW2d 203 (1976) (citations omitted); see also *Port Huron*, *supra* at 161. In other words, "a party may not participate in an arbitration and adopt a 'wait and see' posture, complaining for the first time" that the arbitrator lacked authority to arbitrate "only if the ruling on the issue submitted is unfavorable." *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95, 99-100; 323 NW2d 1 (1982).

As a preliminary matter, the Court cannot determine whether the parties engaged in mediation prior to arbitration. Plaintiff's allegation that the parties never engaged in mediation was first raised in its answer to defendant's motion to confirm. As such, defendant has not had an opportunity to respond to the allegation. Resolution of this allegation, however, does not affect the outcome of the case at bar.

Accepting, arguendo, that the parties did not attempt mediation before submitting their dispute for arbitration, the Court is satisfied that the arbitrator nevertheless had authority to arbitrate the dispute. Plaintiff does not dispute the authenticity of its "answering statement and counterclaim" for breach of contract in the arbitration proceedings, which defendant has included as an exhibit to its motion. See Defendant's Exhibit C. Further, plaintiff has not disputed defendant's allegation that the parties participated in arbitration over the course of three years, at

the expiration of which the arbitrator rendered an award in favor of defendant. Moreover, there is no indication that plaintiff objected to arbitrating the parties' dispute at any time during the pendency of the arbitration proceeding. Since the uncontroverted evidence before the Court indicates that plaintiff voluntarily submitted its own counterclaims to arbitration, the Court finds that plaintiff is precluded from challenging the arbitrability of the underlying issues. Therefore, plaintiff cannot now challenge the arbitrator's authority to arbitrate the parties' dispute.

Having determined that the arbitrator had authority to arbitrate the parties' dispute, the Court is satisfied that the arbitrator's award should not be vacated for the reasons suggested by plaintiff. Moreover, the Court is aware of no errors which are apparent on the face of the award. As such, the Court is satisfied that the arbitral award must be confirmed.

For the reasons set forth above, defendant's motion to confirm the arbitration award is GRANTED, the award of $261,767.02 is CONFIRMED, and plaintiff's case is DISMISSED. Pursuant to MCR 2.602(A)(3), this Opinion and Order resolves the last pending claim and closes this case.

IT IS SO ORDERED.

EDWARD A. SERVITTO
CIRCUIT JUDGE

MAY 12 2006

A TRUE COPY
CARMELLA SABAUGH, COUNTY CLERK
BY: _____ Court Clerk

EDWARD A. SERVITTO, JR., Circuit Court Judge

Date:

Cc: John Grylls, Attorney for Defendant

Mark Butler, Attorney for Plaintiff